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No. 99-1040

In the Supreme Court of the United States

PORT OF PORTLAND, PETITIONER

v.

DONALD RONNE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Longshore and Harbor Workers' Compensation Act, the relevant "time of injury" for purposes of calculating permanent total disability compensation arising from a consequential injury—one that naturally or unavoidably results from a prior injury—is the date of that prior injury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 192 F.3d 933. The decision and order of the Benefits Review Board (Pet. App. 16-23) and the decision and order of the administrative law judge (Pet. App. 24-42) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1999. Pet. App. 1. The petition for a writ of certiorari was filed on December 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation to covered employees for work-related injuries that result in disability. 33 U.S.C. 902(2), 903(a), 908, 909. An "'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury." 33 U.S.C. 902(2). Disability means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10); see *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 127 (1997). The Act provides compensation for all such disability, whether temporary or permanent, and whether partial or total.[1] 33 U.S.C. 908. Permanent total disability—the kind at issue in this case—is compensated at the rate of two-thirds of the employee's "average weekly wages" "at the time of the injury." 33 U.S.C. 908(a), 910.[2]

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[1] The LHWCA provides three methods for compensating permanent partial disability. There are scheduled injuries for which no loss of earning capacity need be established, 33 U.S.C. 908(c)(1)-(20); a catch-all category for unscheduled injuries, which require proof of loss of earning capacity, 33 U.S.C. 908(c)(21); and a special third system for latent occupational diseases that manifest themselves after retirement, 33 U.S.C. 908(c)(23). See generally *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 154-159 (1993).

[2] The calculation of average weekly wage depends on the employee's work history. If the employee worked substantially the whole year prior to the injury, the employee's actual wages will be used; if the employee worked sporadically, the wages of the "same class [of] work[er]" govern; and, if neither of those two methods can be "reasonably and fairly" applied, a sum that "reasonably represent[s] the annual earning capacity of the injured employee" is determined with reference to the employee's previous earnings

2. Respondent Donald Ronne was working as a longshoreman for petitioner Port of Portland in October 1988, when he suffered a knee injury. He stopped working, underwent knee surgery, and returned to longshoring after nine months, in August 1989. He reinjured his knee two months later, and has not worked since. He underwent two additional knee surgeries and developed a lower back condition, beginning in July 1992, as a result of his knee injuries. Petitioner agrees that the back condition directly resulted from the knee injuries, agrees that the back condition is totally disabling, and has accepted responsibility for it. Pet. 8; Pet. App. 25. Petitioner also does not dispute that Ronne's earning capacity at the time of the first and second knee injuries was $963.64 a week. *Id.* at 38; see note 4, *infra*. Petitioner disagrees, however, that Ronne's compensation should be based on his earning capacity before the knee injuries, and instead maintains that "the compensation payable for total disability should reflect only the actual additional economic loss caused by the back injury—the loss of $170 of potential weekly earnings" that Ronne hypothetically could have earned, after his second knee injury, in available alternative, nonmaritime employment. Pet. 8-9. The disputed issue in this case, therefore, is whether $963.64 or $170.00 should be the wage base used for determining Ronne's disability benefits.

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at the time of injury, earnings of a similar class of workers, or other employment of the injured employee. 33 U.S.C. 910(a)-(c); see *Metropolitan Stevedore Co.*, 521 U.S. at 126-127. The Act also sets forth additional methods for calculating the average weekly wage for occupational diseases that do not immediately result in disability or death. 33 U.S.C. 910(d); see *Bath Iron Works Corp.*, 506 U.S. at 156-158.

3. An administrative law judge (ALJ) awarded Ronne compensation for various successive periods of partial and total disability.[3] Pet. App. 41. Of significance here, the ALJ awarded permanent total disability benefits following the onset of Ronne's back problems, and he computed benefits based on Ronne's average weekly wages ($963) from the time of his knee injury,[4] even though the back condition arose post-retirement, two and one-half years later. Relying on the stipulation that "Mr. Ronne's lower back condition is a sequela of his knee injuries," *id.* at 25, and the legal principle that

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[3] The ALJ awarded temporary total disability benefits from the first knee injury in December 1988, until Ronne's return to work in August 1989. Ronne again became temporarily totally disabled after the second knee injury in October 1989, until November, 29, 1990, the date he was released by his physician for sedentary work. The ALJ found that from November 30, 1990, through March 3, 1992, the date of his third knee operation, suitable alternative employment (as a security guard) was available, and therefore that Ronne was entitled to permanent partial disability benefits in accordance with the schedule of benefits for disabilities of specific body parts. 33 U.S.C. 908(c). From March 4, 1992, through April 7, 1994, Ronne was temporarily totally disabled due to the third knee surgery; thereafter, he became permanently totally disabled due to the consequential back condition. See Pet. App. 41.

[4] The ALJ calculated Ronne's average weekly wages in accordance with 33 U.S.C. 910(c). Instead of using Ronne's earnings at the time of the second knee injury, which the ALJ stated would cause a distorted average weekly wage, he used Ronne's wages at the time of the first knee injury. The ALJ stated the earlier wages were the proper measure of Ronne's average weekly wage at the time of his knee injuries because they were temporally proximate and accurately reflected a consistent earning capacity. Pet. App. 37-39. The Benefits Review Board affirmed, noting the ALJ's full explanation and the failure of any party to appeal the finding. *Id.* at 19 n.2, 23.

"in natural progression cases such as this, the average weekly wage is calculated as of the time of the initial injury," *id.* at 40 (citing *Merrill* v. *Todd Pac. Shipyards Corp.*, 25 Ben. Rev. Bd. Serv. (MB) 140 (Nov. 26, 1991)), the ALJ rejected petitioner's contention that Ronne's total disability should be compensated based on the "hypothetical security guard wage" he could have earned, "not his pre-knee injury longshore wage." *Ibid.*[5]

4. In a per curiam decision, the Benefits Review Board affirmed. Pet. App. 16-23. In rejecting petitioner's argument that Ronne's permanent total disability benefits overcompensated him, the Board distinguished this case from others where claimants were theoretically entitled to double compensation based on concurrent partial disability awards. Here, the Board observed, Ronne was entitled to consecutive awards, became permanently totally disabled after being permanently partially disabled, and double compensation was not awarded. *Id.* at 21. Moreover, the Board ruled that the ALJ's finding that "claimant's back condition [is] the natural and unavoidable result of his knee condition" is supported by substantial evidence, and agreed that compensation for consequential injuries,

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[5] Following his second knee injury but prior to the total disability resulting from the back condition, Ronne was released by his physician to perform sedentary work. For this time period, petitioner proffered evidence of the availability of suitable alternative employment as a security guard in order to rebut the presumption of total disability (which arose from Ronne's inability to return to the waterfront, see *e.g.*, *Hairston* v. *Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988)). Pet. App. 31-33. Although the ALJ found suitable alternative employment was available, he did not, contrary to petitioner's assumption, make any findings regarding Ronne's hypothetical salary from this employment.

like Ronne's back condition, must be calculated based on the wages at the time of the initial injury. *Id.* at 22.

5. The court of appeals also affirmed. Pet. App. 1-15. The court observed that the LHWCA sets liability, disability, and compensation from "the time of injury," and that in "most cases of traumatic injury the date of injury and the date of disability coincide." Pet. App. 5-6. The court stressed that the second knee injury in October 1989 immediately disabled Ronne: he could no longer work as a longshoreman and, consequently, his income suffered. Moreover, Ronne's back condition arose "naturally and unavoidably" from the knee injury, and thus, the injury was "complete" and "irrevocably fixed" at the time of the knee injury, even though the back condition became manifest only after Ronne had walked on damaged knees for a period of time. *Id.* at 8.[6] Thus, Ronne's disability, according to the court, was similar to the claimant's occupational hearing loss in *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153 (1993), wherein this Court set the "time of injury" as the date of last exposure to injurious noise rather than the manifestation of the hearing loss, because the injury was "complete" at the time of the last exposure. See Pet. App. 7-8.[7]

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[6] The court, Pet. App. 10-15, rejected the Director's argument that Ronne's lower back condition was an occupational disease under Section 2(2) of the Act, 33 U.S.C. 902(2), and therefore, he should be compensated in accordance with the special provisions concerning those diseases. See 33 U.S.C. 910(d)(2).

[7] The court of appeals distinguished Ronne's disability from the Ninth Circuit's prior decision in *Johnson* v. *Director, OWCP*, 911 F.2d 247 (9th Cir. 1990), cert. denied, 499 U.S. 959 (1991), in which the claimant's total disability became manifest years after the accident, and after years of continued employment. Pet. App. 6-7.

The court recognized that calculating benefits on the basis of earnings at the time of the knee injury was consistent with "natural progression principles" in other contexts under the LHWCA. Pet. App. 8-9. For instance, in assigning liability between respective employers the employer at the time of an initial injury—not the employer at the time of a subsequent injury—will be entirely liable if the disability results from the natural progression of the earlier traumatic injury. *Id.* at 9. Similarly, the Special Fund, which provides financial relief to employers in certain instances, see 33 U.S.C. 908(f), will not be liable if total disability results from the natural progression of a pre-existing partial disability. Pet. App. 9-10.

For the foregoing reasons, the court concluded that, in natural progression cases, compensation should be based on earnings at the time a worker can no longer perform his former employment. Such a rule, the court stated, comports with the "humanitarian purposes" of the LHWCA and the mandate to construe its provisions liberally in favor of claimants. Pet. App. 10. Thus, the court held: "where an employee's total disability naturally progresses from a single accidental injury, the employee should be compensated at the average weekly wage rate as of the time of the accident if he cannot return to his former employment after that time." *Id.* at 2.

ARGUMENT

The court of appeals properly rejected petitioner's contention that compensation for Ronne's permanent and total disability should be based on hypothetical wages from work that Ronne could have performed between his knee injury and his resulting, totally disabling, back condition. That decision comports with

the decisions of this Court and other courts interpreting the LHWCA. Furthermore, contrary to petitioner's contention (Pet. 2-3), no circuit conflict exists. Petitioner's contention that the decision below conflicts with *Johnson* v. *Director, OWCP*, 911 F.2d 247 (9th Cir. 1990), cert. denied, 499 U.S. 959 (1991), rests on a misinterpretation of that decision, which was distinguished by the panel below. In any event, even if we assume, *arguendo*, that the Ninth Circuit panel in this case erred in distinguishing *Johnson*, the result would be a mere intracircuit conflict, and would provide no basis for review by this Court.

1. The court of appeals correctly understood that, although the LHWCA does not define "time of injury" for traumatic injuries, in most cases the time of injury coincides with the onset of disability for purposes of computing benefits. Pet. App. 6 (citing *Johnson*, 911 F.2d at 249, and *Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280, 1288 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984)). The court's enunciation of that general rule comports with precedent from this Court and other courts of appeals. See *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 165 (1993) (date of last exposure to excessive noise is relevant time of injury for calculating benefits for occupational hearing loss); *LeBlanc* v. *Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Director, OWCP* v. *General Dynamics Corp.*, 769 F.2d 66, 68 (2d Cir. 1985).

The result below rested on the factual finding that the back condition was a direct and unavoidable consequence of an immediate disability suffered at the time of the knee injury, which permanently prevented his return to his former employment. Pet. App. 7 ("[Ronne] was disabled from the moment he suffered that knee injury and was never released to continue his

employment as a longshoreman."). The court's emphasis on Ronne's inability to return to former employment, even though the level of disability varied, led to the legal conclusion that the relevant time for computing the average weekly wage dates back to the knee injury. It is unclear what result the Ninth Circuit might reach in other contexts, because the decision in this case is tied to the peculiar facts at hand: a claimant whose disability, although it temporarily and slightly improved, never permitted the claimant to return to his former employment.[8]

With the date of the knee injury thus established as the relevant date of injury, Ronne's earnings from that time period provided the correct basis for calculating total disability compensation. 33 U.S.C. 908(a) (totally disabled employee receives two-thirds of average weekly wages); 33 U.S.C. 910 ("average weekly wage of the injured employee at the time of the injury shall be taken as the basis" to compute compensation); 33 U.S.C. 910(a)-(c) (setting out methods for computing average weekly wages); Pet. App. 37-39.[9]

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[8] Although the court's holding is reasonable under its view of the facts before it, we do not suggest that the "time of injury" of a consequential injury relates back to the initial injury in all cases. Indeed, the court below rejected the Director's analysis that Ronne's back condition was properly classified as a latent occupational disease subject to compensation under 33 U.S.C. 908(c)(23) and 910(d)(2)(B) (utilizing a national average weekly wage for retirees with latent occupational diseases). Pet. App. 10-15.

Because the court found the back condition was neither an occupational disease nor latent, petitioner's discussion of the 1984 congressional amendments, which established a compensation system for latent occupational diseases (see Pet. 13-15), is irrelevant.

[9] See note 4, *supra*, for a description of the ALJ's precise methodology in calculating Ronne's average weekly wage. That methodology and its application in this case are not in dispute.

Petitioner argues that the hypothetical wage Ronne could have earned in suitable alternative employment after his knee injury should be utilized as the relevant benchmark for establishing average weekly wages. Pet. 8-9; Pet. App. 5, 20, 39-40. There is no statutory or case support for calculating average weekly wage in that manner. Rather, the LHWCA clearly distinguishes between average weekly wage and an injured employee's residual wage-earning capacity, *i.e.*, the hypothetical wages here. See 33 U.S.C. 908(c)(21) (deducting residual wage earning capacity from average weekly wage to compute unscheduled permanent partial disability benefits); compare 33 U.S.C. 908(h), and *Potomac Elec. Power Co.* (*PEPCO*) v. *Director, OWCP*, 449 U.S. 268, 272 n.5 (1980), with 33 U.S.C. 910(a)-(d) (setting forth different formulae for establishing residual wage-earning and average weekly wage capacity). Moreover, Ronne's residual wage-earning capacity, even if ascertained, see note 4, *supra*, is irrelevant under the terms of the statute, because the knee injury was a *scheduled* permanent partial disability (the type that requires no particularized showing of loss of earning capacity), and his back condition was totally disabling (by definition, allowing no present earning capacity). Simply put, petitioner is mixing apples and oranges.

Similarly mistaken is petitioner's argument that the court below blended scheduled and unscheduled disability, and thus contravened *PEPCO*, *supra*. Pet. 11-13. The compensation at issue here is for *total* disability; *PEPCO* concerned permanent partial disability. This distinction is critical, as the *PEPCO* Court made clear: "since the § 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes

irrelevant." 449 U.S. at 277-278 n.17. Moreover, while the same average weekly wage was used here to calculate the partial and the total disability benefits, the awards were consecutive, not concurrent, and thus did not result in any double recovery. See Pet. App. 21-22.

2. The court of appeals' legal conclusion does not create any conflict in the circuit courts. Petitioner, citing *Johnson* v. *Director, OWCP*, 911 F.2d 247 (9th Cir. 1990), cert. denied, 499 U.S. 959 (1991), contends that "[t]he Ninth Circuit holds firmly to the position * * * that 'time of injury' means 'time when the disability attributable to the injury became manifest.'" Pet. 2-3. As the court of appeals recognized, however, the principle in its prior decision in *Johnson* does not conflict with the rule applied in the present case. Pet. App. 7. The holding in *Johnson* was based on the factual premise that the "claimant's injury, although due to a traumatic episode, was not evident until a few years later." 911 F.2d at 249. Until the time that her injury disabled her—four years later—Johnson continued to work and earn raises. The *Johnson* court thus analogized Johnson's "latent" accidental injury to a latent occupational disease and located the "time of injury" at the time she became disabled and was unable to work. That holding was explicitly intended to give the claimant the benefit of the higher wage and to encourage employees to return to work. Those concerns do not exist in the present case, in which Ronne suffered *immediate* disability—and a decrease in earning capacity—at the time of his initial accident. Pet. App. 6-8.

Even if petitioner were correct that the panel's treatment of *Johnson* is unpersuasive, however, *Johnson* was also a Ninth Circuit decision. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It

is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Petitioner points to no other case that would establish a conflict in the circuits on this narrow and fact-dependent issue.[10]

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[10] As petitioner admits (Pet. 19), there have been few cases like this one. Consequently, the courts of appeals have had little opportunity to address, much less disagree on, the time of injury in a consequential injury case. Although petitioner suggests that *Stancil* v. *Massey*, 436 F.2d 274 (D.C. Cir. 1970), and *Hastings* v. *Earth Satellite Corp.*, 628 F.2d 85 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980), may conflict with the decision below (Pet. 3), *Hastings* involved two distinct injuries rather than a consequential injury, and *Stancil* involved the statute of limitations, not the "time of injury" for purposes of calculating benefits. The third case cited by petitioner, *LeBlanc* v. *Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157 (5th Cir. 1997), supports the outcome in this case, see *id.* at 161 ("time of injury" means "the time of the accident causing the injury"). Even if petitioner's belief that Ronne has been overcompensated compared to his theoretical pre-back injury earning capacity were correct, which we doubt, that consequence would not justify a different result or further review. See *PEPCO*, 449 U.S. at 283-284 (courts may not rewrite statute to avoid incongruities).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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